



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Richard Lyons, Jr.
d/b/a Richard Lyons, Jr. Logging & Landclearing
18 Dodge Hill Road
P.O. Box 12
Bennington, NH 03442

Re: Dublin – Tax Map 5, Lot 2
Wetlands File #2004-0476

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 05-006**

January 4, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division ("the Division") to Richard Lyons, Jr., db/a Richard Lyons, Jr. Logging & Landclearing, pursuant to RSA 482-A:13 and Env-C 601. The Division is proposing that fines totaling \$14,000 be imposed against Richard Lyons, Jr., d/b/a Richard Lyons, Jr. Logging & Landclearing for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH 03302.
2. Richard Lyons, Jr. is an individual doing business as Richard Lyons, Jr. Logging & Landclearing having a mailing address of P.O. Box 12, Bennington, NH 03442.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted New Hampshire Administrative Rules Env-Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner of DES is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Norman Bemis, Jr. is the owner of land located at Route 101, Dublin, NH, more particularly described on the Dublin Tax Map 5 as Lot 2 ("the Property").
4. On March 22, 2004, the Division received a *Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact* from Norman Bemis for the Property ("Notice"). Alan Klotzbier signed the Notice as the logger for Mr. Bemis.

5. As required by the Notice, Mr. Klotzbier also submitted a US Geological Survey map with the Notice locating the log landing and six wetland crossings to be placed on the Property for the purpose of conducting logging activities.
6. The Notice states that the Property owner's signature certifies that "all logging contractors have been directed to conform to the *Best Management Practices for Erosion Control on Timber Operations in NH*, April 1996, ("Forestry BMPs") and have been instructed to install crossings only as indicated on the attached map and sketches."
7. Alan Klotzbier was hired by Norman Bemis for forestry work on the Property.
8. Richard Lyons, Jr., d/b/a Richard Lyons, Jr. Logging & Landclearing was hired by Mr. Klotzbier as the logging contractor for the Property.
9. On March 26, 2004, Division personnel spoke to Mr. Klotzbier and explained the wetlands standard dredge and fill permitting process. He was also informed that he was required to follow the Forestry BMPs.
10. On April 1, 2004, the Division issued a "Complete Forestry Notification" letter to Norman Bemis for the Property, acknowledging receipt of his Notice and stating that his Notification is sufficient to start work provided that he follows the Forestry BMPs and avoids wetlands and stream crossings where possible.
11. On April 7, 2004, Division received a complaint from a Department of Resources and Economic Development Forest Ranger alleging that Forestry BMP violations existed on the Property and that turbidity was present in the surface waters.
12. On April 16, 2004, Division personnel met Richard Lyons, Jr. on the Property, who identified himself as the logger. Division personnel informed Mr. Lyons that he was causing rutting and turbidity in and around the wetlands near the log landing, and suggested that he install water bars and/or other types of erosion controls to remedy the problem.
13. Also on April 16, 2004, Division personnel conducted an inspection of the Property and observed the following:
 - a. A large log landing had been established directly adjacent to a Palustrine Scrub-Shrub wetland and a seasonal stream (per the attached crossing and impact location map dated April 22, 2004);
 - b. Siltation fencing installed at the landing had been installed within the wetlands, not above the wetlands, therefore it did not serve as a barrier protecting the wetlands but instead allowed sediment to be deposited within the wetlands;
 - c. At Crossing One (per the attached crossing and impact location map dated April 22, 2004), siltation fencing had been installed but had not been trenched in, therefore it did not serve as a protective siltation barrier, but instead allowed water to flow beneath the curtain;

- d. At Crossing Two (per the attached crossing and impact location map dated April 22, 2004), no siltation or erosion controls had been installed;
 - e. No drainage or diversion ditches had been installed to prevent runoff or sediment from entering the adjacent watercourses or skid trails;
 - f. Poled fords installed at Sediment Erosion Area One, Crossing Two and Crossing Three (per the attached crossing and impact location map dated April 22, 2004) were being used at high flow and were overtopped with water, causing sediment to be deposited into adjacent wetlands;
 - g. There was turbidity in adjacent wetlands as a result of the logging work that had occurred at Crossing One and Sediment Erosion Area One (per the attached crossing and impact location map dated April 22, 2004).
 - h. Erosion from the skid trail at Sediment Erosion Area One had created approximately 20' x 30' (600 square feet) of fill and turbidity in the wetland area depicted as Sediment Fill Area One on the attached crossing and impact location map dated April 22, 2004;
 - i. Approximately 5,600 square feet (approximately 3,000 square feet from the northwest side of Crossing Three to Wetland Flag Number WD66 and approximately 2,600 square feet from the northwest side of Crossing Four to Wetland Flag Number WD64 as depicted on the attached crossing and impact location map dated April 22, 2004) of erosion/sediment fill in forested wetlands; and
 - j. Approximately 300 linear feet (approximately 200 linear feet of intermittent stream northwest of Crossing Three to Wetland Flag Number WD66 and approximately 100 linear feet of intermittent stream northwest of Crossing Four to Wetland Flag Number WD64 as depicted on the attached crossing and impact location map dated April 22, 2004) of seasonal intermittent stream impacts and fill from erosion/sediment.
14. Also on April 16, 2004, Mr. Klotzbier and Mr. Lyons stated that work had been done on the Property during recent rains. Division personnel requested the following from Mr. Lyons and Mr. Klotzbier:
- a. Voluntarily stop work on the Property, except for measures necessary to stabilize the Property; and
 - b. Submission of an erosion and sediment control plan and a restoration plan for review and approval by DES.
15. On May 19, 2004, the Division received a restoration plan for the Property from Mr. Klotzbier's consultant, Carl Hagstrom at Monadnock Septic Design. In a letter that accompanied the restoration plan, Mr. Hagstrom stated that the restoration plan had been prepared for Alan Klotzbier. The Division reviewed the restoration plan, determined that it was not adequate for approval and notified Mr. Hagstrom.

16. On June 21, 2004, Division personnel inspected the Property and found that logging had resumed and was completed and that no attempt had been made to stabilize the Property or repair the failed erosion controls. A tractor-trailer belonging to Richard Lyons, Jr. Logging and Landclearing was observed at the entrance of the site. Division staff again requested that Mr. Klotzbier stabilize the Property. Mr. Klotzbier was informed at that time that further enforcement action would be taken.

17. Also during the June 21, 2004 inspection, Division personnel observed the following new impacts:

- a. Approximately 1,000 square feet of fill in wetland along the east side of Crossing One as depicted on the attached crossing and impact location map dated April 22, 2004; and
- b. Approximately 3,000 additional square feet of fill in wetland along the southeast side of Sediment Fill Area One as depicted on the attached crossing and impact location map dated April 22, 2004 (a total of 3,600 square feet of impact to Sediment Fill Area One).

18. On July 12, 2004, Division personnel contacted Mr. Klotzbier and confirmed that he was aware the Restoration Plan submitted on May 19, 2004 was not sufficient. Mr. Klotzbier stated that he was aware of the plan's inadequacy and that he was working with Mr. Lyons to maintain BMPs on the Property. He admitted that no stabilization measures had been taken since the June 21, 2004 inspection.

19. Work continued on the Property after the Division had requested that no work be done on the Property until after approval of a stabilization and restoration plan. The additional work caused impacts in addition to those observed on April 16, 2004.

20. Between 1999-2002, the Department of Resources and Economic Development's Division of Forest and Lands has issued one warning, two administrative summons (resulting in convictions), and three orders to cease and desist for violations of RSA 482-A and/or RSA 485 A:17 to Richard Lyons, Jr. for four different properties throughout the state.

IV VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

- 1. Richard Lyons, Jr. has violated RSA 482-A:3, I by filling approximately 4,600 square foot area of wetlands without a permit from DES. For this violation Env-C 614.03(b)(1) specifies a fine of \$1,000.
- 2. Richard Lyons, Jr. has violated RSA 482-A:3, I by filling approximately 5,600 square foot of forested wetlands without a permit from DES. For this violation Env-C 614.03(b)(1) specifies a fine of \$1,000.
- 3. Richard Lyons, Jr. has violated RSA 482-A:3, I by filling approximately 300 linear feet of seasonal stream without a permit from DES. For this violation Env-C 614.05(c)(1) specifies a fine of \$2,000.

4. Richard Lyons, Jr. has violated Env-Wt 304.05 (b) by failing to comply with the BMPs, specifically by:

- a. Failure to use erosion controls throughout the Property;
- b. Failure to use water-bars, geo-textile fabric, and approach stabilization;
- c. Failure to stabilize four crossings;
- d. Use of poled fords at high flow; and
- e. Placing a log landing directly adjacent to a wetland.

For these violations Env-C 614.06(c) b-e, specifies a fine of \$2,000 per violation, for a total fine of \$10,000.

The total fine being sought is \$14,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Richard Lyons, Jr., d/b/a Richard Lyons, Jr. Logging and Landclearing has the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, March 28, 2004, at 1:00 pm in Room C-110** of the DES offices at **29 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, Mr. Lyons is required to respond to this notice.** Please respond **no later than February 7, 2005**, using the enclosed colored form as follows:

1. If Mr. Lyons plans to attend the hearing, please sign the appearance (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If Mr. Lyons chooses to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Mr. Lyons wishes to discuss the possibility of settling the case, please sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate your interest in settling.

Mr. Lyons is not required to be represented by an attorney. If Mr. Lyons chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If Mr. Lyons wishes to have a hearing but are unable to attend as scheduled, Mr. Lyons must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If Mr. Lyons does not notify the DES Legal Unit in advance and do not attend the hearing, the hearing will be conducted in Mr. Lyons' absence in accordance with Env C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Mr. Richard Lyons, Jr. committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Mr. Lyons committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Mr. Lyons proves, by a preponderance of the evidence, applies in this case:**


1. The violation was a one-time or non-continuing violation, **and** Mr. Lyons did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Mr. Lyons did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Mr. Lyons was making a good faith effort to comply with the requirement that was violated.
3. Mr. Lyons has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Mr. Lyons' case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Richard Lyons, d/b/a Richard Lyons, Jr. Logging and Landclearing committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Mr. Lyons' opportunity to present testimony and evidence that Mr. Lyons did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Mr. Lyons has any evidence, such as photographs, business records or other documents, that he believes show that Mr. Lyons did not commit the violation(s) or that otherwise support Mr. Lyons' position, Mr. Lyons should bring the evidence to the hearing. Mr. Lyons may also bring witnesses (other people) to the hearing to testify on Mr. Lyons' behalf.

If Mr. Lyons wishes to have an informal meeting to discuss the issues, Mr. Lyons must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If Mr. Lyons has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.


COPY
Harry T. Stewart, P.E.
Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Harry T. Stewart, P.E., Director
Public Information Officer, DES PIP Office
Mary Ann Tilton, DES WD
Marjory Swope, NHACC
Dublin Conservation Commission
Dublin Board of Selectmen

***** RETURN THIS PAGE ONLY *****

**RICHARD LYONS, JR., D/B/A RICHARD LYONS, JR. LOGGING AND
LANDCLEARING IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN FEBRUARY 7, 2005

APPEARANCE On behalf of Richard Lyons, Jr., d/b/a Richard Lyons, Jr. Logging and Landclearing.

_____ I will attend the hearing scheduled for **Monday, March 28, 2005, at 1:00pm** in Room C-110 of the DES offices at 29 Hazen Drive in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

Phone Number: _____

WAIVER OF HEARING On behalf of Richard Lyons, Jr., d/b/a Richard Lyons, Jr. Logging and Landclearing.

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$14,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone Number: _____

**RETURN THIS PAGE ONLY TO:
Michael Sclafani, Legal Assistant
Department of Environmental Services ~ Legal Unit
6 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095**

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

CO-2

2002

Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.